



COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000420-D

MIKAIL SAJJAAD MUHAMMAD

APPELLANT

ON REVIEW FROM COURT OF APPEALS

V.

NO. 2013-CA-000018
OLDHAM CIRCUIT COURT NO. 12-CI-00807

KENTUCKY PAROLE BOARD

APPELLEE

BRIEF FOR APPELLANT

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Certificate

The undersigned does hereby certify that the original and 10 copies of this Brief for Appellant will be hand-delivered this 3rd day of February, 2014, to the Office of the Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, Kentucky 40601, for filing, and that a true and correct copy of this brief was served by mail, postage prepaid, this 3rd day of February, 2014, upon John Cummings, Counsel for Kentucky Parole Board, Justice and Public Safety Cabinet, Office of Legal Services, 275 E. Main Street, Frankfort, KY 40602; Hon. Karen Conrad, Chief Circuit Judge, Oldham County Courthouse, 100 W. Main Street, La Grange, KY 40031; and Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601.



AARON REED BAKER

INTRODUCTION

The Court of Appeals erred when it reversed the grant of Appellant Mikail Sajjaad Muhammad's petition for a writ of habeas corpus. It erred by holding that because the Kentucky Parole Board's determination was authorized by statute, that determination was therefore not void *ab initio*, despite the Commonwealth's agreement at sentencing not to exercise that authority. It further erred by holding that Muhammad was not entitled to a writ of habeas corpus because relief was available pursuant to RCr 11.42.

Muhammad appeals from the Court of Appeals order reversing and remanding the grant of habeas corpus, as well as from the Court of Appeals order denying reconsideration.

STATEMENT OF ORAL ARGUMENT

The Appellant requests that the Kentucky Supreme Court hold oral arguments in this case.

STATEMENT CONCERNING CITATIONS

The transcript of record will be cited as "TR" with the volume and the page number cited directly following (e.g. TR I, 1). The proceedings contained on the video will be cited in conformance with CR 98(4)(a).

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STATEMENT OF THE CASE

In 2008, Mikail Sajjaad Muhammad ("Muhammad") entered a plea of guilty in Fayette Circuit Court to Sexual Abuse in the First Degree. (TR I, 1). He was sentenced to two years in prison and five years of postincarceration supervision. (TR I, 1). After serving out his two year sentence, Muhammad was released to begin his five years of postincarceration supervision. In May 2011, Muhammad entered an Alford plea to charges of Receiving Stolen Property over \$500 and being a Persistent Felony Offender in the Second Degree, for a term of eight years. (TR I, 2). After the entry of the plea, Muhammad was surprised to learn from the Division of Probation and Parole that his postincarceration supervision would be revoked. (TR I, 2). He asked the Fayette Circuit Court to allow him to withdraw his plea as not knowingly and voluntarily made. His motion was granted and he was appointed new counsel. (TR I, 2).

Muhammad's new counsel negotiated a plea bargain with the Commonwealth for a three-year sentence to the Receiving Stolen Property Over \$500 charge, a dismissal of the PFO count, and an agreement not to revoke Muhammad's postincarceration supervision. (TR I, 2). In reliance on the terms of this plea agreement, Muhammad entered a guilty plea and subsequently served out his three-year sentence. (TR I, 2). Despite the Commonwealth's agreement not to revoke him, the Division of Probation and Parole sought to have Muhammad's postincarceration supervision revoked. (TR I, 2). After a hearing before an administrative law judge, Muhammad was returned to prison to face the Kentucky Parole Board. The Board revoked his postincarceration supervision, requiring Muhammad to serve the remainder of that term in prison. (TR I, 2).

Muhammad filed a *pro se* RCr 11.42 petition in Fayette Circuit Court and counsel was appointed to represent him. (TR I, 24). The only relief available under RCr 11.42 is vacating, modifying or correcting the judgment and sentence. This relief was not adequate since Muhammad had already served out his sentence on the Receiving Stolen Property charge. Counsel instead filed a petition for a writ of habeas corpus in Oldham Circuit Court. (The Fayette County RCr 11.42 motion was later dismissed as moot at Muhammad's request.) The habeas petition named Martin Granado, the warden of Roederer Correctional Complex as the Respondent. (TR I, 1). Counsel for the Department of Corrections added the Kentucky Parole Board to the case style as a "real party in interest." (TR II, 194).

After a hearing and a period of briefing, the Oldham Circuit Court granted the petition. (TR II, 302). Muhammad was released upon the order of that court, but remained under monitoring of the Division of Probation and Parole because his period of sex offender postincarceration supervision had not yet expired. The Kentucky Parole Board appealed the order of the Oldham Circuit Court. (TR II, 307). As a result of that expedited appeal, the Court of Appeals entered an order reversing and remanding with directions to the Oldham Circuit Court to enter an order denying the petition for a writ of habeas corpus. (Tab 2). Muhammad timely sought reconsideration of that order, which was subsequently denied. (Tab 3).

In circuit court, Muhammad argued that the Fayette County Commonwealth's Attorney, as an agent of the Commonwealth, had real or apparent authority to bind the Commonwealth (and thus the Kentucky Parole Board) when the Commonwealth agreed as part of the plea offer that Muhammad's postincarceration supervision would not be

revoked. He relied upon that agreement to his detriment, in that he pled guilty and served out his sentence. (TR I, 3-6). The appeal from the grant of the writ of habeas corpus petition was expedited, and thus the Court of Appeals did not have the benefit of briefs from the parties. The Court of Appeals decided this case by order, and reversed and remanded the case on two grounds: 1) the determination by the Parole Board to revoke the conditionally discharged¹ sentence is authorized by KRS 532.043(5) and is not void, and 2) RCr 11.42 was a more appropriate method to present Muhammad's grievances and therefore habeas corpus relief was not available. (Tab 2). Muhammad sought reconsideration in order to more fully present his arguments to the Court of Appeals, but reconsideration was denied. Muhammad thereafter filed a Motion for Discretionary Review with this Court, asking that he be allowed to appeal from the Court of Appeals order directing the Oldham Circuit Court to enter an order denying his petition for a writ of habeas corpus and from the order denying reconsideration.

STANDARD OF REVIEW ON APPEAL

The resolution of this appeal does not involve a dispute over the facts of this case. Rather, this appeal deals with questions of law: whether the Court of Appeals' legal bases for ordering reversal are valid, and whether the Oldham Circuit Court's underlying legal reasoning, that the Commonwealth must be held to its bargains, is sound. Because these arguments represent questions of law, the matter is reviewed de novo. Kentucky Farm Bureau Mut. Ins. Co. v. Blevins, 268 S.W.3d 368, 372 (Ky.App. 2008).

¹ The Court of Appeals used the "conditional discharge" language of the previous version of the KRS 532.043. Throughout this brief, the Appellant will use the term "sex offender postincarceration supervision" or simply "postincarceration supervision" unless quoting the Court of Appeals order.

ARGUMENTS

Muhammad made a deal with the Commonwealth not to revoke his postincarceration supervision. This Court has long held:

The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word. [...] If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy. [...] [W]e find it less evil that a criminal should escape punishment than that the government should be allowed to welsh on its bargain.

Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), overruled on other grounds by Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991). This appeal raises questions of the authority of the Commonwealth's Attorney to make agreements that bind other members of the executive branch and whether the extraordinary relief of the writ of habeas corpus is available in these particular instances. While pondering these serious and weighty legal issues, the Court must not lose sight of the crux of this matter: we must not allow the Commonwealth to escape its obligations by raising legal objections to fulfilling its bargains, especially when the result is the continued incarceration of a citizen who has fulfilled his part of the bargain.

ARGUMENT I

THE COURT OF APPEALS ERRED WHEN IT HELD THAT MUHAMMAD WAS NOT ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE DETERMINATION BY THE PAROLE BOARD TO REVOKE POSTINCARCERATION SUPERVISION IS AUTHORIZED BY KRS 532.043(5)

This issue is preserved by Muhammad's petition for a writ of habeas corpus and Muhammad's motion for reconsideration to the Court of Appeals. (TR I, 1-7; Tab 3).

Citing Jones v. Commonwealth, 319 S.W.3d 295 (Ky. 2010), the Court of Appeals noted that the power to revoke postincarceration supervision now rests solely in the hands of the executive branch. The Court concluded that because the determination to revoke made by the Parole Board is authorized by statute, it is not void. Since Commonwealth v. Marcum, 873 S.W.2d 207 (Ky. 1994) decrees that habeas corpus relief is only available to a prisoner who can demonstrate that the judgment by which he is being detained is void *ab initio*, the Court of Appeals concluded that habeas relief was not available to Muhammad. This conclusion is in error.

Prior to the Jones decision, revocation of a defendant on sex offender postincarceration supervision required the Commonwealth's Attorney to make a motion to revoke, and then the circuit court would decide whether revocation was appropriate. Jones held that involvement of the judicial branch in the decision whether to revoke was a violation of the separation of powers doctrine because "the statute imposes upon the judiciary the duty to enforce conditions set by the executive branch." Id at 299. The Court went on to say "the General Assembly can, consistent with the separation of powers doctrine, create a form of conditional release with terms and supervision by the executive branch. However, the statutory scheme runs afoul of the separation of powers doctrine when revocation is the responsibility of the judiciary." Id at 299-300. Clearly, it was the involvement of the courts, not the involvement of the Commonwealth's Attorney, that was a constitutional problem.

Following the Jones decision, the Kentucky legislature amended KRS 532.043(5) to conform the procedure to the constitutional requirements set out in Jones. The courts and the Commonwealth's Attorney were removed from the process and the responsibility

was given to the Division of Probation and Parole and the Parole Board. However, the removal of the Commonwealth's Attorney from the process was not constitutionally mandated. To the extent that the Court of Appeals relies on Jones or the amendments to KRS 532.043(5) for the proposition that the Commonwealth's Attorney may not be involved in the revocation process, it is mistaken. Instead, as discussed below, because the Commonwealth's Attorney had the authority to bind the Kentucky Parole Board when he agreed not to revoke Muhammad, the Parole Board's determination was void *ab initio*.

ARGUMENT II

THE COURT OF APPEALS ERRED WHEN IT HELD THAT MUHAMMAD WAS NOT ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE DETERMINATION BY THE PAROLE BOARD TO REVOKE POSTINCARCERATION SUPERVISION WAS NOT VOID *AB INITIO*

This issue is preserved by Muhammad's petition for a writ of habeas corpus and Muhammad's motion for reconsideration to the Court of Appeals. (TR I, 1-7; Tab 3).

The Court of Appeals concluded that simply because KRS 532.043(5) provides the Parole Board with the power to revoke a defendant's postincarceration supervision, their decision to do so in this case was not void. However, this ignores the reality that simply because the Parole Board *may* revoke a defendant's postincarceration supervision does not mean that they *must*. The determination is not void because the Parole Board lacked statutory authority; rather, it is void because the executive branch of the Commonwealth of Kentucky had *agreed not to exercise that authority* as part of the plea bargaining contract.

Both the Parole Board and the Commonwealth's Attorney are members of the executive branch. See Jones v. Commonwealth, 319 S.W.3d 295, 298 (Ky. 2010)(noting that the Parole Board is a member of the executive branch). The power to make plea

agreements is given to the Commonwealth's Attorney and this Court has recognized that "[p]rosecutors have broad discretion regarding what crime to charge, what penalty to seek, and whether to negotiate or accept plea bargains." Moore v. Commonwealth, 983 S.W.2d 479, 487 (Ky. 1998). A defendant could not negotiate directly with the Parole Board as part of the plea bargaining process. As the representative of the Commonwealth, the Commonwealth's Attorney has the power to bind the entire Commonwealth, in particular the executive branch, in making a plea bargain, regardless of whether that bargain is wise. See Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), overruled on other grounds by Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991). "[W]hen a Commonwealth Attorney makes a plea bargain and promises something, that promise is binding on the state of Kentucky itself." Salyers v. Commonwealth, 2005-CA-002073-MR, 2007 WL 706866 (Ky. App. 2007)(Unpublished opinion attached hereto as Tab 4). Plea bargains are, in all respects, binding contracts between the government and defendants. Putty v. Commonwealth, 30 S.W.3d 156, 159 (Ky. 2000); Commonwealth v. Reyes, 764 S.W.2d 62, 64-65 (Ky. 1989). As such they are to be interpreted according to ordinary contract principles. United States v. Ramunno, 133 F.3d 476, 484 (7th Cir. 1998). A plea agreement includes an implied obligation of good faith and fair dealing. U.S. v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995).

[I]f the offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable. Constitutional as well as contractual rights become involved. [...] In commercial contract law this is offer and acceptance, making a contract, or an offer and detrimental reliance which creates an estoppel preventing withdrawal of the offer. [...] When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the [United States Supreme] Court in Santabello:

[Santabello v. New York, 404 U.S. 257 (1971)] when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled.

Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989). Applying these contract principles to Muhammad's plea bargain, it becomes clear that Muhammad relied to his detriment on the prosecutor's offer. He even performed his half of the bargain when he served his 3-year sentence. The principle of estoppel must prevent the Commonwealth from refusing to uphold its end of the bargain. Reyes decrees that Muhammad has a due process guarantee to see the bargain enforced.

No statute exists that forbids the Commonwealth Attorney from using revocation as a bargaining chip, even though it is no longer his responsibility to make motions related to revocation. He may still, on behalf of the Commonwealth's executive branch, promise a defendant that his postincarceration supervision will not be revoked by another member of the executive branch. Moreover, it does not matter whether he is promising on behalf of the Division of Probation and Parole not to recommend revocation, or on behalf of the Parole Board not to impose revocation—the practical effect is the same.

The Court's reliance on KRS 532.043(5) is misplaced because that statute merely grants the power to the Parole Board to revoke postincarceration supervision. It neither mandates revocation nor speaks to what member of the executive branch may make agreements with defendants not to revoke postincarceration supervision. Thus, simply having the power to revoke does not make the Parole Board's determination valid in this case. The Court must look beyond the statute to the reality that the Commonwealth's Attorney represented, on behalf of the Commonwealth and its executive branch, that he would not have the defendant's postincarceration supervision revoked if the defendant

pleaded to three (3) years of imprisonment. The defendant upheld his end of the bargain in reliance on that representation. The Parole Board is bound by the deals made by the plea bargaining representative of the executive branch, the Commonwealth's Attorney, and therefore, its determination to the contrary is void *ab initio* because the executive branch of the Commonwealth of Kentucky had agreed not to exercise that authority as part of the plea bargaining contract.

A substantial question is raised by this appeal as to whether a court has the power to order Muhammad's release in the face of the Parole Board's authority to make determinations regarding postincarceration supervision or whether such a ruling by the court is *ultra vires* or outside the power of the court. Other jurisdictions have dealt with this issue, and their decisions are instructive.

The United States Court of Appeals for the Fourth Circuit had held: "Unquestionably there is substantial precedent for the proposition that promises made during plea bargaining by government agents are not *ultra vires* for lack of authority." Plaster v. United States, 720 F.2d 340, 354 (4th Cir. 1983).

The Fourth Circuit was relying on a decision out of the United States Court of Appeals for the Second Circuit in making that determination. In Thomas Palermo's case, he made a plea agreement that was premised on the understanding that he would receive parole after a certain period of time. He fulfilled his portion of the bargain, but the parole board refused to honor the prosecution's agreement as to parole. The court ruled:

Clearly, then, Santobello [Santobello v. New York, 404 U.S. 257 (1971)] requires relief when the prosecutor fails to fulfill promises within his power made in negotiating a plea bargain. United States v. Brown, 500 F.2d 375 (4th Cir. 1974); United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973). We believe that the reasoning underlying Santobello applies no less when the prosecutor makes unfulfillable promises in negotiating a plea.

Most importantly, the voluntariness of a plea induced by unfulfillable promises is, of course, open to grave doubt. In Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the Supreme Court declared that a guilty plea induced by misrepresentation, including unfulfilled or unfulfillable promises, could not stand. Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promise and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). Thus, the courts have afforded relief where prosecutors have made specific sentencing promises which were unfulfillable, since sentencing lies totally within the court's discretion, United States v. I. H. Hammerman II, 528 F.2d 326 (4th Cir. 1975); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173 (4th Cir. 1975); Correale v. United States, *supra*, or where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction, United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc), cert. denied, 417 U.S. 933, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1974). Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) involved breach of a Department of Justice plea bargain which entailed, in part, a promise of parole after three years imprisonment. On appeal, the Department argued that the district court usurped the exclusive power of the Parole Board by ordering release. The Court of Appeals, although it remanded the case for a determination of what the Parole Board would do when informed of the bargain, concluded that such a bargain "fits well within the realm of enforceable constitutional rights..." 513 F.2d at 869 n.11. We agree and hold that where a defendant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled.

The district court determined that specific performance of the plea bargain would constitute the only meaningful relief in the context of this case. The court found that if the agreement had been fulfilled, Palermo would have been released from prison in August, 1970, and the five year parole supervision period would have expired in 1975. Since both of these time periods had passed, the court ordered Palermo's unconditional release. The State argues that the proper remedy would have been remand to the state court for vacatur of the Provident robbery plea.

In Santobello, the Supreme Court listed the possible remedies as either specific performance of the agreement or vacatur of the plea, the choice to be a discretionary one guided by the circumstances of each case. 404 U.S. at 263, 92 S.Ct. 495. Where appropriate, the courts have not hesitated to mandate specific performance of the agreement. Correale v. United States, *supra*; Harris v. Superintendent, Va. State Penitentiary, *supra*. We cannot conclude that the district court erred in determining that specific performance was the proper remedy in this case. Palermo had already been incarcerated for the entire promised prison sentence and parole term.

Remand for withdrawal of the guilty plea would indeed have been meaningless, as the court below found.”

Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296-97 (2d Cir. 1976). The Fourth Circuit’s reasoning is directly applicable to this case. The Fayette County Commonwealth’s Attorney promised Muhammad that he would not be revoked—a promise that is arguably unfulfillable. Vacatur of his plea would be an insufficient remedy, because like the petitioner in Palermo, he has already served his sentence. Withdrawal of his guilty plea would be meaningless—or worse, could leave Muhammad in a worse position than the one in which he finds himself today, since he would be facing the PFO charge that was dismissed as part of the plea bargain.

In another case where a petitioner had believed that his parole would not be revoked as part of a plea bargain, the United States District Court for Virginia ruled that:

The crucial fact is that petitioner's belief formed a significant part of the inducement to enter a plea of guilty. United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975). By his letters, he revealed to the court and to counsel that he held certain expectations and no effort was undertaken to dispel them. Were this simply a matter of contract law, a contract would have been formed on petitioner's terms since the other parties had reason to know of his mistake; certainly a criminal defendant is entitled to at least similar standards of fairness when contracting for his liberty. The fact that the prosecution lacked the power to implement such a bargain is immaterial. United States v. Hammerman, *supra*. Petitioner placed all concerned on notice of his understanding and their failure to correct the matter rendered the plea involuntary. A guilty plea so induced cannot be permitted to stand.

Accordingly, the petition for habeas corpus is hereby granted. Respondent may elect to enforce the plea bargain according to petitioner's understanding or to re-arraign and retry him. An appropriate order will this day be entered.”

Clark v. Sumner, 458 F. Supp. 1050, 1052 (W.D. Va. 1978). The District Court in this case has similarly concluded that where a defendant was induced to plead guilty by

promises of parole, it matters not that the prosecution lacked that power. The respondent must be allowed to enforce the plea bargain.

The United States Court of Appeals for the Ninth Circuit has also held that where the state allows a plea bargain with an illegal component to be completely fulfilled on the defendant's part before it is heard to complain of the illegality, the defendant must prevail. It further ruled that it may order specific performance where that is the only viable remedy for the defendant. *See Sconce v. Garcetti*, 96 F.3d 1451 (9th Cir. 1996).

By granting relief to Muhammad, this Court would not be blazing a new trail, but following a long line of legal precedents in several federal circuits as well as its own precedent set by *Workman*, *supra*. Such relief is the correct legal conclusion to reach, as it complies with notions of fundamental fairness and due process.

ARGUMENT III

THE COURT OF APPEALS ERRED WHEN IT HELD THAT MUHAMMAD WAS NOT ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE RELIEF WAS AVAILABLE TO HIM UNDER RCR 11.42

This issue is preserved by Muhammad's petition for a writ of habeas corpus and Muhammad's motion for reconsideration to the Court of Appeals. (TR I, 1-7; Tab 3).

The Court of Appeals insisted that the proper remedy for Muhammad is to proceed under RCr 11.42. The Court of Appeals is mistaken for several reasons. First, no court has jurisdiction to hear an RCr 11.42 motion on either Muhammad's 2011 or 2008 conviction. Second, RCr 11.42 does not provide adequate relief for Muhammad. Third, this Court's case law clearly supports the use of the writ of habeas corpus in this case.

D. No court has jurisdiction to hear an RCr 11.42 motion on Muhammad's 2011 judgment and the statute of limitations has run for an RCr 11.42 motion on Muhammad's 2008 conviction

Muhammad has already served the entire sentence on the Receiving Stolen Property conviction, and "RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody." Sipple v. Commonwealth, 384 S.W.2d 332 (Ky. 1964).

The Court of Appeals errs by suggesting that Muhammad must seek relief under RCr 11.42. There are two convictions involved in this case. The first is the 2008 conviction, which was for a sex offense and resulted in the imposition of the period of postincarceration supervision that Muhammad is now serving. Muhammad is not complaining about the bargain he entered into on the 2008 conviction. The second conviction is the 2011 conviction for Receiving Stolen Property over \$500. That is the conviction that was resolved by the plea bargain at issue in this case, and was the conviction that resulted in the Kentucky Parole Board's impermissible revocation of Muhammad's postincarceration supervision from his 2008 conviction.

Muhammad has already served every day of the sentence received on his 2011 conviction. The case law is clear that RCr 11.42 cannot be used to challenge any judgment other than the one on which a defendant is serving. Sipple, supra. Thus, because he is no longer serving the sentence imposed in the 2011 case, Muhammad cannot challenge that conviction under RCr 11.42.

The 2011 conviction is the one with the disputed plea bargain. Not only does Muhammad have no desire to challenge his 2008 conviction, but he is already well

outside the 3-year statute of limitations for RCr 11.42 motions on the 2008 conviction. RCr 11.42(10). Therefore, no court in this Commonwealth has jurisdiction to hear an RCr 11.42 motion on either Muhammad's 2008 or 2011 convictions. The Court of Appeals erred in holding that RCr 11.42 relief was available to him.

E. RCr 11.42 does not provide adequate relief for Muhammad

The Court of Appeals also held that relief under RCr 11.42 was adequate to redress Muhammad's grievances. RCr 11.42 provides for specific types of relief. Upon motion of the prisoner, the actions a court may take in regards to a sentence are to "vacate, set aside or correct it." RCr 11.42(1). Such relief simply does Muhammad no good. Muhammad does not want his sentence to be vacated or set aside. Rather, he wants the benefit of the bargained sentence that he agreed upon.

Muhammad received a sentence and a period of postincarceration supervision for his 2008 conviction. For his 2011 conviction, he received only a sentence of imprisonment, but that conviction was the basis of his revocation of postincarceration supervision. The Court of Appeals insists that he must seek RCr 11.42 relief from the 2011 conviction because it contends that his trial attorney misadvised him about what party had authority to agree not to revoke his postincarceration supervision. However, Muhammad has served his entire 2011 sentence and is no longer incarcerated on that case.

If Muhammad were to proceed under RCr 11.42 and successfully argue that the ineffective assistance of his trial counsel led to this situation, the remedy would place him back at the pretrial stage. That relief is insufficient. Muhammad has already served his three year sentence for the 2011 conviction, which was his half of the bargain that was

struck. The Commonwealth's half of the bargain was not to revoke his postincarceration supervision. If the sentence were vacated, Muhammad might proceed to trial and prevail, but he would not get back the time already spent in prison. He might also get a new plea bargain, but that bargain would almost certainly *not* contain an agreement not to revoke his postincarceration supervision. (And if it did, we would simply end up right back in the same place.) Muhammad does not benefit from having his sentence vacated. He only benefits if he receives specific performance of the bargain which his counsel has negotiated and he has performed under.

F. This Court's decisions support Muhammad's right to pursue the writ of habeas corpus

The Court of Appeals cites Commonwealth v. Marcum, 873 S.W.2d, 207, 212 (Ky. 1994) for the proposition that habeas relief is only available when a prisoner is being held on a judgment that is void *ab initio*. Muhammad contends that the Kentucky Parole Board's determination is void *ab initio* because it was made in violation of a binding agreement by the Commonwealth not to seek the revocation of Muhammad's postincarceration supervision. The Court of Appeals' reliance on Marcum is further misplaced because this Court's discussion of the interplay between RCr 11.42 and the writ of habeas corpus in that case leads to the inescapable conclusion that the writ is available to Muhammad in this case.

The petitioner in Marcum sought his immediate release from custody because he contended that the circuit court had lost jurisdiction to enter the amended judgment under which he continued to be held. The Commonwealth argued that he had not shown that

the RCr 11.42 procedure was inadequate and should therefore be required to pursue relief through that avenue. Id at 208-209.

The Court first noted that Wingo v. Ringo, 408 S.W.2d 469 (Ky. 1966) and its progeny require a showing that the relief provided by RCr 11.42 is inadequate, but then went on to say “[t]he problem is not in the general principle, but in deciding what constitutes a ‘showing of inadequacy of the remedy provided by RCr 11.42.’” Marcum at 210. The Court then reasoned:

On the one hand, RCr 11.42, a rule of this Court, certainly cannot supplant the right to a writ of habeas corpus, a fundamental right guaranteed by Sec. 16 of our Kentucky Constitution. Where the writ would apply, the rule can only substitute where it is fully as adequate. This writ is an expedited procedure of a summary nature. See KRS 419.020–.110. The statutory provisions in KRS Chapter 419 implementing the constitutional guarantee of the writ of habeas corpus emphasize the importance of an expedited procedure where it is clear someone is being unlawfully detained. KRS 419.030 specifies “[t]he writ must be made returnable as soon as possible.” KRS 419.110(1) specifies “[t]he hearing on the writ shall be summary in nature.” KRS 419.130 provides a method for an expedited appeal. Because this case involved habeas corpus, as contrasted with an RCr 11.42 procedure, this case was assigned out and decided in the Court of Appeals in barely two months, and treated as expeditiously as possible in our Court. An RCr 11.42 is treated as a routine case in the circuit court, and follows a normal appellate procedure, all of which can take several years.

Id. The Commonwealth’s counter-arguments were that RCr 11.42 provides a more orderly procedure, complete with records of the original case and witnesses, and that allowing relief pursuant to the writ of habeas corpus opens up a floodgate of litigation in the courts where the state’s prisons are located. The questions that the Court was required to address were:

When should the prisoner be entitled to demand habeas corpus notwithstanding the alternative provided by RCr 11.42? How should we define when the RCr 11.42 procedure should be deemed inadequate notwithstanding that over time presumably it will achieve the same result?

Id. The Court then compared and contrasted the uses of the writ of habeas corpus and RCr 11.42. Citing Smith v. Henson, 182 S.W.2d 666 (Ky. 1944), the Court reiterated that:

[A] habeas corpus proceeding is a collateral attack on that judgment. It lies only where the judgment is void and does not lie to obtain a new trial or an appeal or release from custody by establishing error or disclosing some latent or hidden fact which may have affected the result.

Id. Whereas, the Court noted by way of contrast that:

RCr 11.42, like habeas corpus, provides a procedure for “collateral attack” but it uses the term in a much broader sense than applies when using habeas corpus to attack a void judgment. RCr 11.42 encompasses every issue that suffices as reason to vacate a judgment which could not have been addressed by direct appeal. Such reasons need not be jurisdictional in nature, nor necessarily such as to render the judgment void or even voidable. They may, and usually do, encompass substantive or procedural defects with no bearing on the power of the court to enter the judgment under which the prisoner is presently confined. In a word, it covers many issues which are not jurisdictional as well as the rare issue which is truly jurisdictional.

Id. at 210-211. The Court then went on to analyze whether Marcum was being held under a void judgment and whether he was entitled to immediate release. It concluded that because Marcum’s case involved a question of whether the court had jurisdiction to enter its judgment whose “peculiar characteristic as a void judgment could be (and was) fairly established within the parameters of a ‘hearing ... summary in nature.’ KRS 419.110(1)” that “[h]abeas corpus is an appropriate remedy, and RCr 11.42 is an inadequate remedy in these circumstances.” Marcum at 211. In conclusion, the Court held:

Thus we recognize as the general rule that the RCr 11.42 procedure is adequate for a collateral attack by a prisoner in custody under a judgment which he believes to be defective for one reason or another. But we recognize as an exception that the prompt relief available by writ of habeas corpus remains for a prisoner who can establish in a summary procedure that the judgment by which he is detained is void ab initio. [...]

[I]n a case such as this habeas corpus is the appropriate remedy, and the existence of RCr 11.42 should not, and shall not, deprive the petitioner of his right to its use.

Id at 211-212. The analogy to this case must lead to the same conclusion. As in Marcum, if Muhammad were able to avail himself of RCr 11.42, its procedures would not provide him the immediate release to which he is entitled, whereas the writ of habeas corpus' expedited process does. And because the Commonwealth's agreement not to revoke Muhammad's postincarceration supervision deprived the Kentucky Parole Board of the authority to do so, its determination was void *ab initio*, resulting in Muhammad's illegal detention. The Court of Appeals' reliance on Marcum to deny Muhammad relief is misplaced. This Court's decision Marcum dictates that Muhammad must be allowed to pursue habeas relief.

CONCLUSION

The Court of Appeals erred in holding that the determination of the Parole Board was not void *ab initio* and that Muhammad could have obtained adequate relief through an RCr 11.42 motion. It was therefore error for the Court of Appeals to reverse and remand this case to the Oldham Circuit Court with direction to enter an order denying Muhammad's petition for habeas corpus relief. The Court of Appeal's error, if allowed to stand, would be a miscarriage of justice in that it would allow the Commonwealth to avoid enforcement of its bargained agreement. This Court has the power to order specific enforcement of the bargain, regardless of whether the Commonwealth had the legal authority to bind the Kentucky Parole Board.

WHEREFORE, Mikail Sajjaad Muhammad respectfully asks this Court to reverse the Court of Appeal's Order and allow the Oldham Circuit Court's grant of Muhammad's petition for a writ of habeas corpus to stand.

Respectfully submitted,



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